92-1052

NO. _____

Supreme Court, U.S.
FILED
MAY 04 1993
OFFICE OF THE CLERK

IN THE
*SUPREME COURT OF THE UNITED STATES*

OCTOBER TERM, 1992

---

LEON SANDERS,

*Petitioner,*

VS.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas

*Respondent.*

---

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Counsel of Record:
Randolph L. Schaffer, Jr.
Schaffer, Lambright, Odom & Sparks
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner,
Leon Sanders

## QUESTIONS PRESENTED

1. Whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence at his initial trial if his conviction is reversed on other grounds.

2. Whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

OPINIONS BELOW . . . . . 2

STATEMENT OF JURISDICTION . . . . . 2

APPLICABLE CONSTITUTIONAL PROVISION . 2

STATEMENT OF THE CASE . . . . . 3

REASONS FOR GRANTING THE WRIT . . . . 6

I. Certiorari should be granted to resolve whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence if his conviction is reversed on other grounds . . . 6

II. Certiorari should be granted to resolve whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct . . . . . 16

CONCLUSION . . . . . 27

## TABLE OF AUTHORITIES

Page

### Cases

**Burks v. United States**,
437 U.S. 1
(1978) . . . . . 13-14,15,24

**Commonwealth v. Marconi**,
490 A.2d 871 (Pa. Super. 1985),
**pet. denied**, 518 A.2d 542
(Pa. 1986) . . . . . 12

**Delk v. Atkinson**, 665 F.2d 90
(6th Cir. 1981) . . . . . 11,12

**Evans v. Court of Common Pleas**,
959 F.2d 1227
(3d Cir. 1992) . . . . . 13

**Ex Parte Sanders**, 771 S.W.2d 645
(Tex. App. - El Paso 1989,
pet. ref'd.) . . . . . 5

**Ex Parte Sanders**, 801 S.W.2d 955
(Tex. App. - El Paso 1990,
pet. ref'd.) . . . . . 5

**Greene v. Massey**, 437 U.S. 19
(1978) . . . . . 14,24

**McNair v. Hayward**, 666 P.2d 321
(Utah 1983) . . . . . 12

**Oregon v. Kennedy**,
456 U.S. 667 (1982) . . . 21,22,27

**Richardson v. United States,**
468 U.S. 317 (1984) . . . . . 10,12

**Sanders v. Lynaugh,**
714 F.Supp. 834
(W.D. Tex. 1988) . . . . . 4,18

**Sanders v. State,**
No. 8-82-32-CR (Tex. App.
- El Paso 1983, pet. ref'd.) . . . 4

**United States v. Curtis,**
683 F.2d 769 (3d Cir.),
**cert. denied,** 459 U.S. 1018
(1982) . . . . . 21

**United States v. Douglas,**
874 F.2d 1145 (7th Cir.),
**cert. denied,** 493 U.S. 841
(1989) . . . . . 13

**United States v. Haddock,**
961 F.2d 933
(10th Cir. 1992) . . . . . 12

**United States v. Miller,**
952 F.2d 866 (5th Cir.),
**cert. denied,** 112 S.Ct. 3029
(1992) . . . . . 9,10,13

**United States v. Porter,**
807 F.2d 21 (1st Cir. 1986),
**cert. denied,** 481 U.S. 1048
(1987) . . . . . 12

**United States v. Rios,**
637 F.2d 728 (10th Cir. 1980),
**cert. denied,** 452 U.S. 918
(1981) . . . . . 21

**United States v. Roberts**,
640 F.2d 225 (9th Cir.),
**cert. denied**, 452 U.S. 942
(1981) . . . . . 21

**United States v. Singleterry**,
683 F.2d 122 (5th Cir.),
**cert. denied**, 459 U.S. 1021
(1982) . . . . . 20

**United States v. Szado**,
912 F.2d 390 (9th Cir.
1990) . . . . . 11-12

**United States v. Wallach**,
979 F.2d 912 (2d Cir. 1992),
**cert. pending**,
No. 92-1437 . . . . . 21,22,23

**Statutes and Constitutions**

**28 U.S.C. §1254(a)** . . . . . 2

**28 U.S.C. §2254** . . . . . 2

**U.S. CONST. amend. V** . . . . . 2

NO. _____

==========

IN THE
*SUPREME COURT OF THE UNITED STATES*

OCTOBER TERM, 1992

---

LEON SANDERS,

*Petitioner,*

VS.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas

*Respondent.*

---

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinions of the Fifth Circuit (Appendix A) and of the district court (Appendix B) are unreported.

## STATEMENT OF JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on March 12, 1993. This court has jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 10.1. The basis for federal jurisdiction in the district court was 28 U.S.C. §2254.

## APPLICABLE CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution:

> ... nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb;
...

## STATEMENT OF THE CASE

On February 12, 1980, petitioner was charged with the murder of Ismael Rivera. A jury empaneled to determine his competency to stand trial found that he was incompetent and that there was no substantial probability that he would attain competency within the foreseeable future. On October 6, 1980, the trial court committed him to a state psychiatric hospital.

On June 3, 1981, a jury rejected uncontroverted expert testimony that petitioner was insane, convicted him of murder, and assessed his punishment at 50 years in prison. The Court of Appeals affirmed the conviction in an unpublished

opinion and the Court of Criminal Appeals denied discretionary review. **Sanders v. State, No. 8-82-32-CR (Tex. App. - El Paso 1983, pet. ref'd.).**

On September 21, 1988, the United States District Court for the Western District of Texas granted habeas corpus relief on the basis that petitioner was denied due process of law and a fair trial because the prosecutor repeatedly and inaccurately argued to the jury that petitioner would be "cut loose" if the jury found him not guilty by reason of insanity. **Sanders v. Lynaugh, 714 F.Supp. 834 (W.D. Tex. 1988).**

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on the basis that no rational trier of fact could have found that he was sane. The

trial court denied relief, the Court of Appeals affirmed, and the Court of Criminal Appeals denied discretionary review. **Ex Parte Sanders, 771 S.W.2d 645 (Tex. App. - El Paso 1989, pet. ref'd.).**

Petitioner then filed a second application for writ of habeas corpus seeking to preclude a retrial on double jeopardy grounds relating to prosecutorial misconduct. The trial court denied relief, the Court of Appeals affirmed, and the Court of Criminal Appeals denied discretionary review. **Ex Parte Sanders, 801 S.W.2d 955 (Tex. App. - El Paso 1990, pet. ref'd.).**

Having exhausted state remedies on both issues, petitioner filed a petition for writ of habeas corpus of a person in state custody in the United States District Court for the Western District

of Texas. On September 11, 1992, the district court denied relief. On March 12, 1993, the United States Court of Appeals for the Fifth Circuit affirmed.

## REASONS FOR GRANTING THE WRIT

**I. Certiorari should be granted to resolve whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence if his conviction is reversed on other grounds.**

On February 12, 1980, petitioner stabbed Ismael Rivera to death. After his arrest, petitioner was examined by several psychiatrists and psychologists, who concluded that he was a severe and chronic schizophrenic. A jury empaneled

to determine his competency found that he was incompetent to stand trial and would remain so into the foreseeable future. Accordingly, he was committed to a state psychiatric hospital.

In June of 1981, petitioner was tried for murder. Two psychiatrists and one psychologist testified that at the time of the murder, petitioner was suffering from severe schizophrenia rendering him incapable of conforming his conduct to the requirements of the law and, that in reasonable medical probability, he was legally insane at that time. The State called no expert witnesses to rebut the testimony of the defense experts. Rather, the State relied on certain lay testimony that petitioner had engaged in purportedly "normal" behavior on the night of the murder. The jury convicted

petitioner of murder and sentenced him to 50 years in prison.

After the state courts affirmed the conviction on direct appeal, petitioner sought federal habeas corpus relief on the basis, inter alia, that the evidence established insanity as a matter of law and that the prosecutors engaged in misconduct by repeatedly and inaccurately arguing during summation that petitioner would be "cut loose" if acquitted by reason of insanity. The federal district court granted habeas corpus relief on the basis of prosecutorial misconduct but declined to address the sufficiency of the evidence.

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on the basis that no rational trier of fact

could have found that he was sane. The state courts addressed the merits and denied relief, as did the federal district court. However, the Fifth Circuit declined to address the merits on the basis of **United States v. Miller, 952 F.2d 866 (5th Cir.), cert. denied, 112 S.Ct. 3029 (1992)**, which held that a criminal defendant may not raise a double jeopardy claim based on insufficient evidence presented at the initial trial in attempting to prevent a retrial if the defendant failed to secure a ruling of insufficient evidence on his first appeal. Even if the evidence at the defendant's initial trial was insufficient to support his conviction, he could not raise the claim of insufficient evidence as a double jeopardy bar to retrial unless an

appellate court reviewing the original conviction found the evidence constitutionally insufficient.

**Miller** relied on **Richardson v. United States, 468 U.S. 317 (1984)**, which held only that a defendant could not bar retrial based on insufficient evidence where the trier of fact at the initial trial never returned a verdict. In **Richardson**, the initial trial ended in a hung jury so the original jeopardy never terminated. In **Miller**, the Fifth Circuit equated the post-verdict granting of a new trial with a mistrial occasioned by a hung jury. This court did not address that issue in **Richardson**. Thus, **Richardson** does not support the proposition on which **Miller** relied.

The federal circuit courts of appeals are divided on this issue. In the

typical situation, a defendant has challenged his conviction on the basis of both insufficient evidence and trial error, has obtained a new trial based on trial error without appellate consideration of the sufficiency of the evidence, and on remand, has sought to bar retrial on double jeopardy grounds based on insufficient evidence. Some courts of appeals have permitted the defendant to challenge the sufficiency of the evidence before retrial on double jeopardy grounds. **Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981);**[1] **United States**

---

[1] The state supreme court held that the evidence was sufficient but reversed the conviction based on trial error. The defendant petitioned the federal court to bar retrial based on insufficient evidence. The Sixth Circuit held that when a state court upholds the sufficiency of the evidence, but orders a new trial based on trial error, the defendant may seek to prevent retrial on double jeopardy grounds in a federal

**v. Szado, 912 F.2d 390 (9th Cir. 1990); United States v. Haddock, 961 F.2d 933, 934, n. 1 (10th Cir. 1992).**[2] Other courts of appeals have declined to do so based on **Richardson. United States v. Porter, 807 F.2d 21 (1st Cir. 1986), cert. denied, 481 U.S. 1048 (1987);**

---

habeas corpus proceeding. If the evidence at trial was legally insufficient, he should have been acquitted, and to expose him to a retrial would violate double jeopardy. **665 F.2d at 92.**

[2] See also **McNair v. Hayward, 666 P.2d 321 (Utah 1983)** (Even though the trial court granted a motion for new trial based on trial error, the defendant could seek to preclude retrial based on insufficient evidence.); **Commonwealth v. Marconi, 490 A.2d 871 (Pa. Super. 1985), pet. denied, 518 A.2d 542 (Pa. 1986).** (The court interpreted **Richardson** as indicating that a review of the sufficiency of the evidence would be necessary if "the sufficiency of the evidence, rather than the circumstances surrounding the mistrial, was the proper focus for the appellate court's double jeopardy inquiry." **490 A.2d at 876, n. 9.**)

**United States v. Douglas, 874 F.2d 1145 (7th Cir.), cert. denied, 493 U.S. 841 (1989); Evans v. Court of Common Pleas, 959 F.2d 1227 (3d Cir. 1992); United States v. Miller, supra.**

For many years, a defendant whose conviction was reversed on direct appeal for insufficient evidence was subject to retrial. Defendants unsuccessfully argued that it should not matter which court granted the acquittal, as a determination of insufficient evidence should bar retrial on double jeopardy grounds. Otherwise, a defendant who should have been acquitted at trial but was improperly convicted was penalized because the appellate court, rather than the trial court, made the finding of insufficient evidence. It was not until 1978 that this court agreed in **Burks v.**

**United States, 437 U.S. 1 (1978)** and **Greene v. Massey, 437 U.S. 19 (1978)**. Before 1978, numerous defendants were retried, improperly convicted, and served prison sentences.

In **Burks**, this court alluded to the present issue in dictum. "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." **437 U.S. at 17.** It follows that petitioner did not waive the right to have the sufficiency of the evidence reviewed following his conviction by simultaneously asserting his procedural right to request a new trial based on trial error. Indeed, petitioner

requested that the federal district court grant habeas corpus relief based on insufficient evidence, but the district court opted to grant relief based on prosecutorial misconduct.

The ultimate issue is whether a defendant in a criminal case waives the right to have the sufficiency of the evidence reviewed following his conviction by also asserting his procedural right to request a new trial based on trial error. This court has never expressly resolved the issue, although the dictum in **Burks** would indicate that there is no waiver. A defendant who is improperly convicted on legally insufficient evidence should be able to bar a retrial on double jeopardy grounds even though he has been granted a new trial based on trial error. This

court should grant certiorari to resolve the conflict in the circuit courts of appeals on this significant issue.

**II. Certiorari should be granted to resolve whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct.**

During the voir dire examination of the jury panel, several veniremen inquired whether a person found not guilty by reason of insanity was committed to a mental institution. The court refused to allow defense counsel to explain the availability of civil commitment proceedings for a person acquitted by reason of insanity, and

instead advised the panel that the jury could not consider what might happen to such a person.

At trial, petitioner presented three experts who testified that he was insane at the time of their respective examinations and at the time of the offense. The State did not present any expert or qualified lay opinion testimony in rebuttal.

During summation, the prosecutors repeatedly and inaccurately argued that petitioner would be "cut loose" if acquitted by reason of insanity, and concluded the summation by advising the jury, "If you want to give this man a license to kill, then cut him loose because he can use that disease for the rest of his life if he wants to." The

trial court overruled a defense objection.

The federal district court subsequently granted habeas corpus relief, concluding that the arguments denied petitioner due process of law and a fair trial, as they "constituted a repeated and persistent attempt to suggest to the jury that the effect of a verdict of not guilty by reason of insanity would be to allow the petitioner to walk the streets in complete freedom [which] ... was a misstatement of the law in Texas." **Sanders v. Lynaugh, 714 F.Supp at 837.**

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on double jeopardy grounds relating to prosecutorial misconduct. At an

evidentiary hearing, the prosecutor testified that he did not "have any question" that petitioner was medically insane; that he recognized the difficulty in convincing the jury that petitioner was sane based on lay testimony alone in view of the uncontroverted expert testimony of insanity; that he knew that if petitioner was acquitted by reason of insanity, the court was required to refer him for civil commitment proceedings; and, that before summation, the prosecutors made a conscious strategic decision to make the "cut loose" arguments even though they recognized that the trial court had previously refused to allow petitioner to explain the availability of civil commitment proceedings for a defendant acquitted by reason of insanity. The intent in making

the argument was to obtain a conviction as opposed to a mistrial. When the court overruled petitioner's objection to the first "cut loose" argument, the prosecutor realized that the court was receptive, so he repeated the argument three times because petitioner had presented a "strong insanity defense" and the prosecutor did not want the jury to rely upon the expert testimony of insanity in deciding the case.

The Fifth Circuit declined to address the merits of petitioner's claim based on circuit precedent holding that prosecutorial misconduct can operate as a double jeopardy bar to retrial only if the trial court declared a mistrial. **United States v. Singleterry, 683 F.2d 122 (5th Cir.), cert. denied, 459 U.S. 1021 (1982).**

The federal circuits courts of appeals are divided on this issue. Several have held that the double jeopardy considerations applicable after a mistrial has been granted in the trial court are equally applicable where the trial court denied the mistrial but an appellate court reversed the conviction due to prosecutorial misconduct. **United States v. Rios, 637 F.2d 728 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981); United States v. Roberts, 640 F.2d 225 (9th Cir.), cert. denied, 452 U.S. 942 (1981)**; cf. **United States v. Curtis, 683 F.2d 769, 774 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), cert. pending, no. 92-1437.**

In **Oregon v. Kennedy, 456 U.S. 667, 676 (1982)**, this court stated in dictum

that double jeopardy does not bar retrial of a defendant whose conviction is reversed on appeal on the same grounds as those sought in an unsuccessful mistrial motion. However, the Second Circuit recently observed in **Wallach** that "the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal." **979 F.2d at 915.** Ultimately, that court concluded, "If any extension of **Kennedy** beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed

at the time was likely to occur in the absence of his misconduct." **Id.** That is precisely what occurred in the case at bar.

The logic of petitioner's position is demonstrated by analogy to the evolution of the law on the issue of whether an appellate reversal for insufficient evidence creates a double jeopardy bar to retrial. Prior to 1978, if a trial court correctly granted an instructed verdict based on insufficient evidence, the defendant could not be retried. However, if the trial court incorrectly denied an instructed verdict, the jury convicted, and an appellate court reversed for insufficient evidence, the defendant could be retried. This made no sense, as it penalized the defendant because of the erroneous ruling of the trial court.

This court finally cured the inequity when it held that an appellate acquittal for insufficient evidence was entitled to the same dignity as a trial court acquittal, and barred retrial on double jeopardy grounds. **Burks v. United States, supra; Greene v. Massey, supra.** In explaining why double jeopardy concerns preclude retrial upon an appellate reversal for insufficient evidence, the court reasoned, "To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the district court." **Burks v. United States, 437 U.S. at 11.**

Accordingly, for double jeopardy purposes, to determine whether the defendant may be retried after his first

trial has been thwarted due to intentional prosecutorial misconduct, whether that result obtains in the midst of trial or on appeal, the focus should be on the nature of the misconduct and not on which court grants relief. It is illogical to create a double jeopardy bar to retrial where the trial court correctly grants a mistrial due to misconduct, but to preclude same where the trial court incorrectly denies the relief requested. Had the trial court sustained the objection to the improper argument and granted a mistrial, petitioner clearly could have asserted that retrial was barred because the mistrial was occasioned by intentional prosecutorial misconduct. The same rule should apply where the "mistrial" in the form of a post-conviction reversal.

Otherwise, the defendant is penalized by being eligible for retrial just because the trial court erred when confronted with a proper defense objection to the prosecutorial misconduct. Trial courts should not be allowed to deny a legitimate motion for mistrial, secure in the knowledge that if there is an unjust conviction and an appellate court corrects the error, the defendant can still be retried, whereas if the trial court grants the mistrial, retrial may be barred. This court should grant certiorari to resolve the circuit conflict on this significant issue.[3]

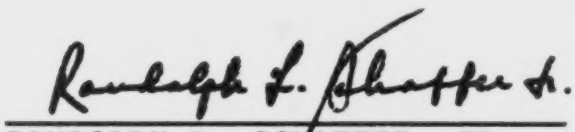
---

[3] In the event that the court grants certiorari and holds that retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct, two additional issues must be resolved on remand to the Fifth Circuit. The first is whether double jeopardy

## CONCLUSION

For all of the above reasons, this court should grant certiorari.

Respectfully submitted,



RANDOLPH L. SCHAFFER, JR.

1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Leon Sanders

---

should preclude a retrial if the prosecutor engaged in misconduct designed to result in an unfair conviction or to avoid a likely acquittal, as opposed to provoking a mistrial. The second is whether improper argument made with the intent to obtain a conviction is the functional equivalent for double jeopardy purposes of an intent to provoke a mistrial under **Oregon v. Kennedy, supra.**

# APPENDIX

# APPENDIX

## TABLE OF CONTENTS


| | Page |
|---|---|
| A. Opinion of the Court of Appeals . . . . . | 1a |
| B. Opinion of the District Court . . . . . | 10a |
| C. Judgment of the Court of Appeals . . . . . | 23a |
| D. Order Staying Mandate . . . . | 24a |

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 92-8515
Summary Calendar

---

LEON SANDERS,

Petitioner-Appellant,

v.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas,

Respondent-Appellee.

---

Appeal from
the United States District Court
for the Western District of Texas
(EP-91-CV-126)

---

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

Leon Sanders, a state prisoner in the custody of the El Paso County Sheriff, Leo Samaniego, appeals from the district court's denial of Sanders' pre-trial habeas corpus petition seeking to bar the State of Texas from retrying Sanders for murder. Finding no error, we affirm.

I.

On February 12, 1980, Leon Sanders stabbed Ismael Rivera to death. After he was arrested, Sanders was examined by a number of psychiatrists and psychologists, who concluded that he was a severe and chronic schizophrenic. A jury empaneled to determine Sanders' competency found that he was incompetent

---

burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

to stand trial and would remain so into the foreseeable future. Sanders was, thus, committed to a state psychiatric hospital in 1980. Over a year later, he was ultimately found competent to stand trial. A jury convicted Sanders of murder and sentenced him to fifty years' imprisonment. The Texas Court of Appeals affirmed his conviction in an unpublished opinion. Sanders thereafter sought habeas corpus relief.

In 1988, the federal district court for the Western District of Texas granted Sanders' first petition for habeas corpus, finding that the state prosecutor's remarks during the closing arguments at the guilt/innocence phase denied Sanders due process of law. See Sanders v. Lynaugh, 714 F. Supp. 834

(W.D. Tex. 1988).[2] Because the district court granted the writ on this ground, it saw no need to reach Sanders' claim that the State's evidence was insufficient to support a rational jury's finding that Sanders was sane at the time of the crime. See id. at 838. The court further held that its grant of the writ of habeas corpus on the prosecutorial misconduct claim did "not preclude a retrial on the Petitioner's case . . . ." Id. Neither the State nor Sanders appealed the district court's order. Rather, the case was remanded to the

---

[2] In particular, the district court held that Sanders was denied due process by the prosecutor's repeated admonishment to jurors that if they found Sanders not guilty by reason of insanity they would be "cutting [him] loose" into society. Id., 714 F. Supp. at 836-37.

state trial court, permitting the State to decide whether to retry Sanders.

The State declared that it intended to retry Sanders for murder. Before the retrial could proceed, however, Sanders filed a plea in bar, arguing that the Double Jeopardy Clause prevented retrial. Sanders' double jeopardy argument was two-fold. First, he contended that because he presented evidence at the first trial to establish insanity "as a matter of law,"[3] Sanders' first trial should be treated as an acquittal for purposes of double jeopardy. Second, he argued, because the federal district

---

[3] In making this argument, Sanders relied on Texas authority that holds that in certain cases involving uncontroverted expert testimony that a defendant was insane at the time of the crime, insanity is established "as a matter of law." See, e.g., Van Guilder v. State, 709 S.W.2d 178 (Tex.Crim.App. 1986).

court's issuance of the writ of habeas corpus was the "functional equivalent" of a declaration by the state trial court of a mistrial based on prosecutorial misconduct intended to provoke a mistrial, the State is barred from seeking a retrial under the Double Jeopardy Clause.[4] The state courts denied pre-trial habeas relief on these grounds, that the federal district court likewise denied Sanders' second writ of habeas corpus. The district court did, however, grant Sanders a certificate of probable of cause to appeal.

---

[4] In making this argument, Sanders relied on the well-established rule that prosecutorial misconduct that intentionally provokes a mistrial bars retrial under the Double Jeopardy Clause. See Oregon v. Kennedy, 456 U.S. 667 (1982).

II.

On appeal to this court, Sanders reasserts his two-pronged double jeopardy argument. Because this circuit's precedent clearly forecloses his claims, we affirm the district court's denial of the writ of habeas corpus.

**A. Double Jeopardy Based on the Sufficiency of the Evidence of Sanity**

With respect to Sanders' argument that the evidence presented at his first trial established insanity "as a matter of law," we observe that the Texas Court of Appeals, on appeal from the state trial court's denial of pre-trial habeas relief, was willing to entertain Sanders' argument that double jeopardy would prevent retrial <u>if</u> the evidence at Sanders' original trial established "as a matter of law" that he was insane at

the time of the crime. See Sanders v. State, 771 S.W.2d 645, 649 (Tex.App.--El Paso 1989). The court simply found that "it appears that a rational jury could have properly concluded that [Sanders] was legally sane at the time of the offense." Id. The federal district court denied Sanders' petition for federal habeas relief for the same reason.

In United States v. Miller, 952 F.2d 866, 870-74 (5th Cir. 1992), cert. denied, 112 S. Ct. 3029 (1992), this court held that a criminal defendant may not raise a double jeopardy claim based on alleged insufficient evidence presented at his original trial in attempting to prevent a retrial, cf. Burks v. United States, 437 U.S. 1

(1978),[5] if the defendant failed to secure a ruling of insufficiency on his first appeal. That is, even if the evidence at a defendant's original trial was insufficient to support his conviction, the defendant cannot raise the insufficiency claim as a double jeopardy bar to a retrial unless a court reviewing the original conviction found the evidence constitutionally insufficient.[6] Furthermore, if the

---

[5] In Burks, the Supreme Court held that the Double Jeopardy Clause bars retrial of a criminal defendant if an appellate court overturns the original conviction based on insufficient evidence.

[6] Although Miller was a federal criminal direct appeal, we see no reason not to apply its holding in the context of federal habeas review of a state criminal case. At least one other circuit had adopted this approach. See Evans v. Court of Common Pleas, 959 F.2d 1227 (3rd Cir. 1992). We also note, however, that at least one other circuit has rejected our position in Miller. See

defendant raised an insufficiency claim on the prior appeal, the rule in Miller still applies even if the previous appellate court or courts failed to address the sufficiency claim and instead reversed on other grounds. See Evans, 959 F.2d at 1229 (noting that original state appellate court rejected the defendant's insufficiency argument while reversing on other grounds).

In the instant case, Sanders raises an insufficiency claim based on the evidence presented at his first trial.[7] Because

---

United States v. Haddock, 961 F.2d 933, 934 n.1 (10th Cir. 1992).

[7] Ordinarily, our review of such an insufficiency claim is based on the straight-forward standard enunciated in Jackson v. Virginia, 443 U.S. 307, 319-20 (1979) -- namely, whether a rational trier of fact could find every element of the charged offense beyond a reasonable doubt. The parties, however, have never mentioned the Jackson standard and have instead mainly cites cases concerning the

this is a habeas appeal -- albeit a pre-trial appeal -- concerning Sanders' retrial, we may not reach the merits of the insufficiency claim underlying his

---

Texas standard governing proof of insanity.

Although we refuse to apply it in the instant case, we note that, in the context of an insanity defense, a federal court applying the standard in Jackson v. Virginia must first look to how state law treats the question of sanity at the time of the crime. In Texas, insanity is an affirmative offense, which the defendant must establish by the preponderance of the evidence. See Texas Penal Code § 8.01(a). A defendant's sanity -- a question which directly implicates the mens rea of murder, an essential element of the crime -- is a rebuttable presumption under Texas law. Thus, our sufficiency review in a Texas case in which the insanity defense was raised at trial simply asks whether, by a preponderance of the evidence, a rational jury could find the defendant sane at the time of the crime. See Fulghum v. Ford, 850 F.2d 1529, 1532-34 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989) (Jackson review of insanity defense raised under Georgia law, which likewise requires a defendant affirmatively to establish insanity by a preponderance of the evidence).

double jeopardy claim. Although the district court thus erred in addressing the merits of this claim in the first place, we nevertheless affirm the court's denial of the writ.

**B. Double Jeopardy Based on Prosecutorial Misconduct**

In the second prong of Sanders' double jeopardy claim, he argues that we should treat the district court's grant of the habeas writ based on prosecutorial misconduct as the "functional equivalent" of a declaration of mistrial caused by calculated prosecutorial misconduct. The premise of Sanders' claim is the Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), in which the Court held that double jeopardy bars retrial when a prosecutor intentionally provokes a mistrial. Sanders ignores that this

court has, for over a decade, limited the rule in Kennedy to cases in which a mistrial has actually been declared by the trial judge. See United States v. Singleterry, 683 F.2d 122 (5th Cir. 1982), cert. denied, 459 U.S. 1021 (1982); but see United States v. Roberts, 640 F.2d 225 (9th Cir. 1981); United States v. Rios, 637 F.2d 728 (10th Cir. 1980); cf. United States v. Curtis, 683

F.2d 769, 774 (3d Cir. 1982).[8] Thus, Sanders' claim must fail.

III.

For the foregoing reasons, we AFFIRM the district court's denial of the writ of habeas corpus.

---

[8] In Singleterry, the defendant made an argument quite similar to Sanders'. We distinguished the narrow rule in Kennedy by noting, "under Kennedy, the double jeopardy clause is concerned only with prosecutorial misconduct that is intended to provoke a mistrial. When a mistrial is not declared, . . . the prosecutor's efforts have been unsuccessful. The dangers that the Kennedy exception was intended to prevent -- that the defendant might lose his 'valued right to complete his trial before the first jury' [citation omitted], and that the prosecutor might be seeking a more favorable opportunity to convict [citation omitted] -- are more attenuated when the defendant is convicted by the first jury but an appellate court reverses for prosecutorial misconduct. Singleterry, 683 F.2d at 124.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

| | | |
|---|---|---|
| LEON SANDERS, | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| v. | ) | No. EP-91-CA-126-H |
| | ) | |
| LEO SAMANIEGO, Sheriff of El Paso County, Texas, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS**

This is a petition for a writ of habeas corpus by a state prisoner. It is actually the most recent in a long series of habeas corpus actions brought by the same Petitioner. On June 3, 1981, the Petitioner was convicted of murder in the 171st District Court of El Paso County, Texas. Punishment was assessed at fifty years imprisonment. In September, 1988, this Court granted a petition for a writ

of habeas corpus and ordered that Petitioner's case be remanded to the 171st District Court with instructions that he be afforded a new trial. **Sanders v. Lynaugh**, 714 F.Supp. 834, 838-39 (W.D. Tex. 1988). The new trial, however, has never been held. Instead, the Petitioner has filed an additional series of habeas corpus actions seeking to obtain his release without trial. It appears that he has exhausted state remedies, and that the present petition is properly before this Court for consideration on its merits.

The Petitioner first contends that retrial is barred on double jeopardy grounds because the evidence at his first trial established as a matter of law that he was legally insane at the time of the killing which resulted in his conviction

for murder. The Petitioner attempted to present this issue in his previous habeas corpus action in this Court, but the Court declined to rule on it, instead deciding the case on other grounds. **Sanders v. Lynaugh, supra** at 838. Now that the issue is presented again, the Court finds that it does not entitle the Petition to habeas corpus relief. Although there is substantial evidence of insanity at the time of the offense, evidence which Petitioner will undoubtedly present in the course of his retrial, this Court is unable to say as a matter of law that the State will be unable to produce sufficient evidence of sanity to create a fact question for the jury. Under Texas law, insanity is an affirmative defense, and the Petitioner in a retrial will have the burden of

proving by a preponderance of the evidence that as a result of a mental disease or defect he did not know that his conduct was wrong or that he was incapable of conforming his conduct to the requirements of the law. Tex. Penal Code, art. 8.01(a). Although at least two psychiatrists and one psychologist have diagnosed the Petitioner as being schizophrenic, they have acknowledged that at the time of the killing the Petitioner's condition could have been in remission and that he could have been able to distinguish right from wrong and to conform his conduct to legal requirements. Furthermore, in the first trial, the prosecution produced certain lay witnesses who testified to arguably "normal" behavior on the part of the Petitioner on the night the killing

occurred. Finally, it is at least theoretically possible that in a retrial, the State could produce additional evidence of sanity, either lay or expert. For example, the record shows that the Petitioner was committed to the Rusk State Hospital for several months in 1980. It is possible that witnesses or records from the state hospital might be offered in evidence at a retrial, and might have a bearing on the issue of the Petitioner's sanity at the time of the offense. Faced with conflicting evidence, the Court is unable to say as a matter of law that a rational jury could not reject the Petitioner's insanity defense and return a verdict of guilty.

The Petitioner also contends that the double jeopardy clause bars his retrial

in this case because the prosecutor in the first trial engaged in intentional misconduct. The Petitioner's first writ was granted in 1988 because the Court found that the Petitioner's due process rights were violated in his first trial by the prosecutor's improper and prejudicial argument. **Sanders v. Lynaugh, supra** at 837. In so ruling, however, this Court made a specific finding that the holding did not preclude a retrial of the Petitioner if the retrial were conducted in a manner consistent with due process. **Sanders v. Lynaugh, supra** at 838. The Petitioner relies, however, on **Oregon v. Kennedy**, 456 U.S. 667 (1982), which held that the double jeopardy clause of the Fifth Amendment, applied to the states by the Fourteenth Amendment, bars a retrial

following a mistrial if the prosecutor in the first trial engaged in conduct which was intended to provoke the defendant into moving for a mistrial. This rule of law, however worthy, has no application to the facts of the instant case. In the Petitioner's first trial, his attorney did not move for a mistrial and none was granted by the trial court. Furthermore, the Petitioner has presented this precise issue to the courts of the State of Texas, and the Texas Court of Appeals has found from the evidence before it that the prosecutor did not intend to provoke a mistrial by the argument he made and that his conduct did not amount to "the functional equivalent of an intent to provoke a mistrial". **Sanders v. State**, 801 S.W.2d 955, 957 (Tex.App.--El Paso 1990). This finding by the state court

is entitled to a presumption of correctness.' 28 U.S.C. § 2254(d). Aside and apart from the statutory presumption, this Court agrees with the factual finding of the state court.

The Court has considered all of the petitioner's contentions, and finds that he is not entitled to habeas corpus relief. Therefore, the following order should be entered.

It is ORDERED that the petition for writ of habeas corpus in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 11th day of September, 1992.

/s/ Harry Lee Hudspeth
Harry Lee Hudspeth
United States District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 92-8515
Summary Calendar

---

D.C. Docket No. EP-91-CV-126

LEON SANDERS,

Petitioner-Appellant,

versus

LEO SAMANIEGO,

Respondent-Appellee.

Appeal from
the United States District Court
for the Western District of Texas

Before KING, DAVIS and WIENER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

March 12, 1993

**APPENDIX D**

United States Court of Appeals

Fifth Circuit
Office Of The Clerk

April 6, 1993

Mr. Randy Schaffer
Attorney at Law
1301 McKinney, Ste. 3100
Houston, TX 77010

No. 92-8515 - Leon Sanders v. Leon Samaniego,
Sheriff of El Paso County, Texas

---

(D.C. No. EP-91-CV-126)

MANDATE STAYED TO AND INCLUDING May 6, 1993

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by

the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

By: /s/ Marilyn A. Taylor
Deputy Clerk

Enclosures

cc: Mr. Eddie L. Martin

MDT-2